FILED

94 282 AUG 15 1994

No. OFFICE OF THE CLERK

In The

Supreme Court of the United States

October Term, 1994

DARREYL M. YOUNG,

Petitioner,

v.

THE NORTHERN ILLINOIS CONFERENCE OF UNITED METHODIST CHURCH, THE BOARD OF ORDAINED MINISTRY, AND R. SHELDON DUECKER, as the Presiding Bishop of the BOARD OF ORDAINED MINISTRY,

Respondents.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

PETITION FOR WRIT OF CERTIORARI

P. JANE RUTHERFORD
Counsel of Record
DEPAUL UNIV. COLLEGE OF LAW
25 E. Jackson Blvd.
Chicago, IL 60604
(312) 362-5269

TIMOTHY P. O'NEILL
THE JOHN MARSHALL LAW SCHOOL
315 S. Plymouth Court
Chicago, IL 60604
(312) 987-2367

Attorneys for Petitioner

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

48 pp

QUESTIONS PRESENTED

1. Whether the complaint of a black woman employee discharged for sex and race discrimination must be dismissed, pursuant to the religion clauses of the first amendment because she performs ministerial functions, even though the government has a compelling state interest in eradicating racial discrimination, and even though Congress's plain language in Title VII prohibits religious employers from discriminating on the basis of sex or race.

2. Whether an employer, who discharged a black woman on the basis of race, can shield itself with a free exercise clause defense from liability under Title VII and neutral principles of contract law, even though the Supreme Court has held in *Employment Division v. Smith* that free exercise rights are subject to neutral generally applicable law.

3. Whether excluding a black woman from the protection provided by Title VII from sex and race discrimination unduly burdens her first amendment free exercise right to pursue her faith as a minister, or discriminates against her on the basis of her religion in violation of the fifth amendment due process clause.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

TABLE OF AUTHORITIES iii

OPINIONS BELOW 1

JURISDICTION 2

STATUTORY PROVISIONS INVOLVED 2

STATEMENT 3

REASONS FOR THE GRANTING THE PETITION .. 5

I. This Case Raises Important Constitutional Issues 8

II. The Seventh Circuit Failed To Follow Binding Supreme Court Precedent When It Refused To Apply *Employment Division v. Smith* 10

III. The Seventh Circuit's Ruling Adds to the Existing Split in the Circuits Over Whether Courts Can Apply Neutral Contract Principles to Rule on Contract Disputes Between Clergy and Their Religious Employers 10

CONCLUSION 12

APPENDIX ..... App. 1

TABLE OF AUTHORITIES

Page

CASES

Black v. Snyder, 471 N.W.2d 715 (Minn.App. 1991) 5

Bob Jones Univ. v. United States, 461 U.S. 574 (1983) 5, 6, 8, 9

C.H.R.O. v. Archdiocesan School Office, 522 A.2d 781 (Conn. 1987), *appeal dismissed*, 484 U.S. 805 (1987) 5, 6

Carter v. Baltimore Annual Conference, 1987 WL 18470 (D. D.C.) 5

Cochran v. St. Louis Prep. Seminary, 717 F.Supp. 1413 (E.D. Mo. 1989) 5

Corp. of the Presiding Bishop of the Church of Jesus Christ of Latter-day Saints v. Amos, 483 U.S. 327 (1987) 5, 7, 8

Dayton Christian Schools v. Ohio Civil Rts. Commission, 477 U.S. 619 (1986) 5, 7, 8

DeMarco v. Holy Cross, 4 F.3d 166 (2d Cir. 1993) 5

Dole v. Shenandoah Baptist Church, 899 F.2d 1389 (4th Cir. 1990), *cert. denied*, 498 U.S. 846 (1990) 5, 7, 8

Dolter v. Wahlert High School, 483 F. Supp. 266 (N.D.Iowa 1980) 5

E.E.O.C. v. Freemont Christian School, 781 F.2d 1362 (9th Cir. 1986) 5

E.E.O.C. v. Kamehameha Schools/Bishop Estate, 990 F.2d 458 (9th Cir. 1993), *cert. denied*, 114 S. Ct. 439 (1993), *vacated*, 848 F. Supp. 899 (D. Haw. 1993) 5, 7

E.E.O.C. v. Mississippi College, 626 F.2d 477 (5th Cir. 1980), *cert. denied*, 453 U.S. 912 (1981) 5, 7, 9

TABLE OF AUTHORITIES – Continued

Page

E.E.O.C. v. Pacific Press Publishing Association, 676 F.2d 1272 (9th Cir. 1981) 5

E.E.O.C. v. Presbyterian Ministries, Inc., 788 F. Supp. 1154 (W.D.Washington 1992) 5

E.E.O.C. v. Southwestern Baptist Theological Seminary, 651 F.2d 277 (5th Cir. 1981) 5

E.E.O.C. v. Tree of Life Christian Schools, 751 F. Supp. 700 (S.D.Ohio 1990) 5

Elbaz v. Congregation Beth Judea, 812 F. Supp. 802 (N.D.K. Eastern Div. 1992) 5

Employment Division v. Smith, 494 U.S. 872 (1990), *reh'g denied*, 496 U.S. 913 (1990) 7, 10, 12

Feldstein v. Christian Science Monitor, 555 F. Supp. 974 (D.Mass. 1983) 5

Fike v. United Methodist Children's Home, 709 F.2d 284 (4th Cir. 1983) 5

Gay Rights Coalition of Georgetown Univ. Law Center v. Georgetown Univ., 536 A.2d 1 (D.C. 1987) 5

Geary v. Visitation of the Blessed Virgin Mary Parish School, 7 F.3d 324 (3d Cir. 1993) 5

Graves v. Methodist Youth Services, 624 F. Supp. 429 (N.D.Ill. 1985) 5

Harvey v. Young Women's Christian Association, 533 F. Supp. 949 (D. N.C. 1982) 5

Hazan v. Catholic Credit Union, 681 P.2d 856 (Wash. Ct. App. 1984) 5

TABLE OF AUTHORITIES – Continued

Page

Heintzelman v. St. Mary's Medical Center, 1989 WL 247140 5

Hutchinson v. Thomas, 789 F.2d 392 (6th Cir. 1986), *cert. denied*, 479 U.S. 885 (1986) 6, 7

Jones v. Wolf, 443 U.S. 595 (1979) 9, 12

Larsen v. Kirkham, 1982 WL 20024, *cert. denied*, 464 U.S. 849 (1983) 6, 7

Little v. St. Mary Magdalene Parish, 929 F.2d 944 (3d Cir. 1991) 6

Little v. Wuerl, 929 F.2d 944 (3rd Cir. 1991), *reh'g denied*, 659 F.2d 1075 (5th Cir. 1981), *cert. denied*, 456 U.S. 905 (1982) 6, 7

Lukaszewski v. Nazareth Hospital, 764 F. Supp. 57 (E.D.Pa. 1991) 6

Madsen v. Erwin, 481 N.E.2d 1160 (D.Mass. 1985) 6

Maguire v. Marquette Univ., 814 F.2d 1213 (7th Cir. 1987) 6

Maness v. Friendly Ave. Baptist Church, 1993 WL 155375 (M.D.N.C.) 6

McClure v. Salvation Army, 460 F.2d 553 (5th Cir. 1972), *cert. denied*, 409 U.S. 896 (1972), *reh'g denied*, 409 U.S. 1050 (1972) 6, 7, 9

McDaniel v. Paty, 435 U.S. 618 (1978) 9

Minker v. Baltimore Annual Conference of United Methodist Church, 894 F.2d 1354 (D.C.Cir. 1990) 6, 8, 9, 11

Molberg v. Apostolic Bible Institute, 1992 Minn. App. LEXIS 354 (1992) 6, 9, 11

Murray v. Kobayashi, 431 P.2d 940 (Hawaii 1967) 6

TABLE OF AUTHORITIES – Continued

Page

Music v. United Methodist Church, 864 S.W.2d 286 (Ky. 1993) 11

Natal v. The Christian and Missionary Alliance, 878 F.2d 1575 (1st Cir. 1989) 8, 11

Ninth & O Street Baptist Church v. E.E.O.C., 633 F. Supp. 229 (W.D.Ky. 1986) 6

Pime v. Loyola Univ. of Chicago, 803 F.2d 351 (7th Cir. 1986) 6

Rayburn v. General Conference of Seventh-Day Adventists, 772 F.2d 1164 (4th Cir. 1985).....6, 7

Ritter v. Mount St. Mary's College, 495 F. Supp. 724 (D.Maryland 1980)..... 6

Russell v. Belmont College, 554 F. Supp. 667 (M.D.Tenn. 1982) 6

Scharon v. St. Luke's Episcopal Presbyterian Hosp., 929 F.2d 360 (8th Cir. 1991)..... 6

Seattle Pacific Univ. v. Haas, 626 F. Supp. 539 (W.D.Wash. 1985)..... 6

Serbian Eastern Orthodox Diocese v. Milivojevich, 426 U.S. 696 (1976) 11, 12

Simpson v. Wells LaMont Corp., 494 F.2d 490 (5th Cir. 1974) 6

Speer v. Presbyterian Children's Home, 824 S.W.2d 589 (Tex.App. 1991), *vacated*, 847 S.W.2d 227 (1993)..... 6

Stouch v. Brothers of the Order of Hermits of St. Augustine, 836 F. Supp. 1134 (E.D.Penn. 1993)....6, 8

Tagatz v. Marquette Univ., 861 F.2d 1040 (7th Cir. 1988)..... 6

TABLE OF AUTHORITIES – Continued

Page

Turner v. Barber-Scotia College, 604 F. Supp. 1450 (M.D.N.C. 1985) 6

Vigars v. Valley Christian Center of Dublin, CA, 805 F. Supp. 802 (N.D.Cal. 1992) 6

Weissman v. Congregation Shaare Emeth, 839 F. Supp. 680 (E.D.Mo. 1993) 6

Whitney v. Greater New York Corp., 401 F. Supp. 1363 (S.D.N.Y. 1975) 6

Yost v. W.Pa.-W.Va. Synod of the Lutheran Church, 789 F. Supp. 191 (W.D.Pa. 1992) 6

Young v. Northern Illinois Conference of United Methodist Church, 818 F.Supp. 1210 (N.D. Ill. 1993) 2, 4

Young v. Northern Illinois Conference of United Methodist Church, 21 F.3d 184 (7th Cir. 1994) 1

STATUTES AND COURT RULES

28 U.S.C. §1254(1) 2

28 U.S.C. §1331 3

28 U.S.C. §1367(a) 3

42 U.S.C. §2000e-1 2

42 U.S.C. §2000e-2 2

42 U.S.C. §2000e-5(f)(1) 3

42 U.S.C. §2000bb 10

F.R.C.P. 12(b)(6) 4

No. _____

In The

Supreme Court of the United States

October Term, 1994

DARREYL M. YOUNG,

Petitioner,

v.

THE NORTHERN ILLINOIS CONFERENCE OF UNITED METHODIST CHURCH, THE BOARD OF ORDAINED MINISTRY, AND R. SHELDON DUECKER, as the Presiding Bishop of the BOARD OF ORDAINED MINISTRY,

Respondents.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

PETITION FOR WRIT OF CERTIORARI

Darreyl M. Young respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App. 1-27, *infra*) is reported at *Young v. Northern Illinois Conference of United Methodist Church*, 21 F.3d 184 (7th Cir. 1994). The

opinion of the district court is reported at *Young v. Northern Illinois Conference of United Methodist Church*, 818 F.Supp. 1206 (N.D. Ill. 1993).

JURISDICTION

The court of appeals entered its judgment on April 7, 1994 (App. 1, *infra*). On June 21, 1994 Justice Stevens signed an order extending the time for filing this petition for certiorari to and including August 15, 1994. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Section 2000e-1 of the Equal Employment Opportunity Act, 42 U.S.C. § 2000e-1, provides in relevant part that the act "shall not apply to an employer with respect to . . . a religious corporation, association, . . . or society with respect to the employment of individuals of a particular religion to perform work connected with the carrying on by such corporation, association, . . . or society of its activities."

Section 2000e-2 of the Equal Employment Opportunity Act provides in relevant part:

> (a) It shall be an unlawful employment practice for an employer –
>
> > (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his

> compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; . . .
>
> (m) Except as otherwise provided in this subchapter, an unlawful employment practice is established when the complaining party demonstrates that race, color, religion, sex, or national origin was a motivating factor for any employment practice, even though other factors also motivated the practice.

STATEMENT

The petitioner, Darreyl M. Young, claims the respondents discharged her due to racial and sexual discrimination in March, 1992. Petitioner is a black woman who was a probationary minister in the United Methodist Church. She timely complained to the E.E.O.C. which issued a right to sue letter on August 3, 1992. She filed her complaint in the United States District Court for the Northern District of Illinois on October 29, 1992. Federal question jurisdiction was proper under 28 U.S.C. § 1331 and 42 U.S.C. § 2000e-5(f)(1). The petitioner also claimed that her employer failed to follow agreed upon procedures. (Complaint ¶¶ 8A – 8C). Supplementary jurisdiction over the contract claim was proper under 28 U.S.C. § 1367(a).

The respondents filed a motion to dismiss the complaint for lack of subject matter jurisdiction and for failure to state a claim, alleging that "principles of separation of church and state . . . " precluded the court from considering the merits of the case. (Defendant's Motion to

Dismiss p. 3). The district court agreed and dismissed the suit on April 19, 1993. Petitioner, Young, appealed and the Seventh Circuit affirmed the district court on April 7, 1994.

Because this case arises from a dismissal on a Rule 12(b)(6) motion, the facts must be construed in the light most favorable to the petitioner. Specifically, the petitioner states that "she served as a Pastor for four (4) years, [and] received excellent references from the church for whom she was a Minister." (Complaint p. 2). She also was a vocal advocate for minorities within the church. (Complaint p. 2). She was denied the appointment to elder and discharged because she was a black woman. (Complaint Counts I & II).

The case does not involve religiously based discrimination. As the district court noted, "[T]here are no religious beliefs specifically at issue. For instance, the complaint does not facially attack the Methodist Church's view, if any, that females or black African-American individuals cannot obtain the Elder position. Assuming the facts are in Young's favor, female black African-American Elders are present in the Northern Illinois Conference of United Methodist Church and there is no denominational bar to their presence." *Young*, 818 F.Supp. 1210.

REASONS FOR GRANTING THE PETITION

Religious entities are the last bastion of employers who are permitted to purposefully discriminate against their employees. The issue keeps arising. At least 54 reported cases have considered the problem of religious employers that discriminate.[1] The Supreme Court

---

[1] *Bob Jones Univ. v. United States*, 461 U.S. 574 (1983); *Black v. Snyder*, 471 N.W.2d 715 (Minn.App. 1991); *C.H.R.O. v. Archdiocesan School Office*, 522 A.2d 781 (Conn. 1987), *appeal dismissed*, 484 U.S. 805 (1987); *Carter v. Baltimore Annual Conference*, 1987 WL 18470 (D. D.C.); *Cochran v. St. Louis Prep. Seminary*, 717 F.Supp. 1413 (Mo. 1989); *Corp. of the Presiding Bishop of the Church of Jesus Christ of Latter-day Saints v. Amos*, 483 U.S. 327 (1987); *Dayton Christian Schools v. Ohio Civil Rts. Commission*, 477 U.S. 619 (1986); *DeMarco v. Holy Cross*, 4 F.3d 166 (2d Cir. 1993); *Dole v. Shenandoah Baptist Church*, 899 F.2d 1389 (4th Cir. 1990), *cert. denied*, 498 U.S. 846 (1990); *Dolter v. Wahlert High School*, 483 F. Supp. 266 (N.D.Iowa 1980); *E.E.O.C. v. Kamehameha Schools/Bishop Estate*, 990 F.2d 458 (9th Cir. 1993), *cert. denied*, 114 S. Ct. 439 (1993), *vacated*, 848 F. Supp. 899 (1993); *E.E.O.C. v. Freemont Christian School*, 781 F.2d 1362 (9th Cir. 1986); *E.E.O.C. v. Mississippi College*, 626 F.2d 477 (5th Cir. 1980), *cert. denied*, 453 U.S. 912 (1981); *E.E.O.C. v. Pacific Press Publishing Association*, 676 F.2d 1272 (9th Cir. 1981); *E.E.O.C. v. Presbyterian Ministries, Inc.*, 788 F. Supp. 1154 (W.D.Washington 1992); *E.E.O.C. v. Southwestern Baptist Theological Seminary*, 651 F.2d 277 (5th Cir. 1981); *E.E.O.C. v. Tree of Life Christian Schools*, 751 F. Supp. 700 (S.D.Ohio 1990); *Elbaz v. Congregation Beth Judea*, 812 F. Supp. 802 (N.D.K. Eastern Div. 1992); *Feldstein v. Christian Science Monitor*, 555 F. Supp. 974 (D.Mass. 1983); *Fike v. United Methodist Children's Home*, 709 F.2d 284 (4th Cir. 1983); *Gay Rights Coalition of Georgetown Univ. Law Center v. Georgetown Univ.*, 536 A.2d 1 (D.C. 1987); *Geary v. Visitation of the Blessed Virgin Mary Parish School*, 7 F.3d 324 (3d Cir. 1993); *Graves v. Methodist Youth Services*, 624 F. Supp. 429 (N.D.Ill. 1985); *Harvey v. Young Women's Christian Association*, 533 F. Supp. 949 (1982); *Hazan v. Catholic Credit Union*, 681 P.2d 856 (Wash. Ct. App. 1984); *Heintzelman v.*

repeatedly gets requests to resolve these matters.[2] Most of the cases are not discriminatory hiring suits, but rather

---

St. Mary's Medical Center, 1989 WL 247140; *Hutchinson v. Thomas*, 789 F.2d 392 (6th Cir. 1986), *cert. denied*, 479 U.S. 885 (1986); *Larsen v. Kirkham*, 1982 WL 20024, *cert. denied*, 464 U.S. 849 (1983); *Little v. St. Mary Magdalene Parish*, 929 F.2d 944 (3d Cir. 1991); *Little v. Wuerl*, 929 F.2d 944 (3rd Cir. 1991), *reh'g denied*, 659 F.2d 1075 (5th Cir. 1981), *cert. denied*, 456 U.S. 905 (1982); *Lukaszewski v. Nazareth Hospital*, 764 F. Supp. 57 (E.D.Pa. 1991); *Madsen v. Erwin*, 481 N.E.2d 1160 (D.Mass. 1985); *Maguire v. Marquette Univ.*, 814 F.2d 1213 (7th Cir. 1987); *Maness v. Friendly Ave. Baptist Church*, 1993 WL 155375 (M.D.N.C.); *McClure v. Salvation Army*, 460 F.2d 553 (5th Cir. 1972), *cert. denied*, 409 U.S. 896 (1972), *reh'g denied*, 409 U.S. 1050 (1972); *Minker v. Baltimore Annual Conference of United Methodist Church*, 894 F.2d 1354 (D.C.Cir. 1990); *Molberg v. Apostolic Bible Institute*, 1992 WL 67518; *Murray v. Kobayashi*, 431 P.2d 940 (Hawaii 1967); *Ninth & O Street Baptist Church v. E.E.O.C.*, 633 F. Supp. 229 (W.D.Ky. 1986); *Pime v. Loyola Univ. of Chicago*, 803 F.2d 351 (7th Cir. 1986); *Rayburn v. Seventh-day Adventists*, 772 F.2d 1164 (1985), *cert. denied*, 478 U.S. 1020 (1986); *Ritter v. Mount St. Mary's College*, 495 F. Supp. 724 (D.Maryland 1980); *Russell v. Belmont College*, 554 F. Supp. 667 (M.D.Tenn. 1982); *Scharon v. St. Luke's Episcopal Presbyterian Hosp.*, 929 F.2d 360 (8th Cir. 1991); *Seattle Pacific Univ. v. Haas*, 626 F. Supp. 539 (W.D.Wash. 1985); *Simpson v. Wells LaMont Corp.*, 494 F.2d 490 (5th Cir. 1974); *Speer v. Presbyterian Children's Home*, 824 S.W.2d 589 (Tex.App. 1991), *vacated*, 847 S.W.2d 227 (1993); *Stouch v. Brothers of the Order of Hermits of St. Augustine*, 836 F. Supp. 1134 (E.D.Penn. 1993); *Tagatz v. Marquette Univ.*, 861 F.2d 1040 (7th Cir. 1988); *Turner v. Barber-Scotia College*, 604 F. Supp. 1450 (M.D.N.C. 1985); *Vigars v. Valley Christian Center of Dublin, CA*, 805 F. Supp. 802 (N.D.Cal. 1992); *Weissman v. Congregation Shaare Emeth*, 839 F. Supp. 680 (E.D.Mo. 1993); *Whitney v. Greater New York Corp.*, 401 F. Supp. 1363 (S.D.N.Y. 1975); *Yost v. W.Pa.-W.Va. Synod of the Lutheran Church*, 789 F. Supp. 191 (W.D.Pa. 1992).

[2] *Bob Jones Univ. v. United States*, 461 U.S. 574 (1983); *C.H.R.O. v. Archdiocesan School Office*, 522 A.2d 781 (Conn. 1987),

benefits or discharge cases. Hence the employers originally found the employees to be qualified for their positions by whatever standards the religions use. The instant case is not a lawsuit over religious standards; it is a case of racial discrimination. The question of whether churches can discriminate on the basis of race, even when they have no religiously based claims to do so, is ripe to be heard.

The suit also raises the issue of whether the Seventh Circuit failed to follow binding Supreme Court precedent when it refused to apply *Employment Division v. Smith*, 494 U.S. 872 (1990), *reh'g denied*, 496 U.S. 913 (1990). *Smith* holds that parties are not entitled to judicially created free exercise exemptions to neutral generally applicable laws. Title VII is precisely such a neutral generally applicable law.

---

appeal dismissed, 484 U.S. 805 (1987); *Corp. of the Presiding Bishop of the Church of Jesus Christ of Latter-day Saints v. Amos*, 483 U.S. 327 (1987); *Dayton Christian Schools v. Ohio Civil Rts. Commission*, 477 U.S. 619 (1986); *Dole v. Shenandoah Baptist Church*, 899 F.2d 1389 (4th Cir. 1990), *cert. denied*, 498 U.S. 846 (1990); *E.E.O.C. v. Kamehameha Schools/Bishop Estate*, 990 F.2d 458 (9th Cir. 1993), *cert. denied*, 114 S. Ct. 439 (1993), *vacated*, 848 F. Supp. 899 (1993); *E.E.O.C. v. Mississippi College*, 626 F.2d 477 (5th Cir. 1980), *cert. denied*, 453 U.S. 912 (1981); *Hutchinson v. Thomas*, 789 F.2d 392 (6th Cir. 1986), *cert. denied*, 479 U.S. 885 (1986); *Larsen v. Kirkham*, 1982 WL 20024, *cert. denied*, 464 U.S. 849 (1983); *Little v. Wuerl*, 929 F.2d 944 (3rd Cir. 1991), *reh'g denied*, 659 F.2d 1075 (5th Cir. 1981), *cert. denied*, 456 U.S. 905 (1982); *McClure v. Salvation Army*, 460 F.2d 553 (5th Cir. 1972), *cert. denied*, 409 U.S. 896 (1972), *reh'g denied*, 409 U.S. 1050 (1972); *Rayburn v. Seventh-day Adventists*, 772 F.2d 1164 (1985), *cert. denied*, 478 U.S. 1020 (1986).

Finally, the suit highlights the conflict among the circuits over whether courts can apply neutral principles of contract law to resolve disputes between clergy and their religious employers. The D.C. Circuit has held that courts can apply neutral contract law to resolve these cases. *Minker v. Baltimore Annual Conference of United Methodist Church*, 894 F.2d 1354 (D.C. Cir. 1990). That case directly conflicts with *Natal v. The Christian and Missionary Alliance*, 878 F.2d 1575 (1st Cir. 1989) and the Seventh Circuit's holding in this case.

I. This Case Raises Important Constitutional Issues.

This Court has acknowledged that the state has a compelling state interest in eradicating racial discrimination even within the confines of religion. *Bob Jones Univ. v. United States*, 461 U.S. 574 (1983). That case expressly left open the question of whether it would apply to churches themselves, as well as religious institutions like schools. 461 U.S. 574, 604 n.29. This case presents the Court with the opportunity to decide the important question of whether the rationale of *Bob Jones University* should be extended to church employers.

Most decisions hold that courts may rule on discrimination claims against churches. *See, e.g., Dole v. Shenandoah Baptist Church*, 899 F.2d 1389 (4th Cir. 1990); *Dayton Christian Schools v. Ohio Civil Rights Comm'n.*, 578 F.Supp. 1004 (S.D. Ohio 1984), *rev'd* 766 F.2d 932 (6th Cir. 1985), *rev'd* 477 U.S. 619 (1986); *Stouch v. Brothers of the Order of Hermits of St. Augustine*, 836 F.Supp. 1134 (E.D. Penn. 1993). They are less likely to permit courts to rule on discrimination claims when the employee discriminated

against is a member of the clergy. *See, e.g., McClure v. Salvation Army*, 460 F.2d 553 (5th Cir. 1972), *cert. denied*, 409 U.S. 896 (1972), *reh'g denied*, 409 U.S. 1050 (1972).

However, courts are willing to apply other neutral laws to religious disputes that do not involve minorities. For example, courts apply neutral principles to resolve church property disputes. *Jones v. Wolf*, 443 U.S. 595 (1979). Some courts even are willing to resolve clergy contract cases with neutral principles. *Minker v. Baltimore Annual Conference of United Methodist Church*, 894 F.2d 1354 (D.C. Cir. 1990); *Molberg v. Apostolic Bible Institute*, 1992 Lexis Minn.App. 354 (1992).

The state has a far greater interest in eradicating race discrimination than in resolving property or contract disputes. The state's interest in abolishing racial discrimination is compelling. *See, e.g., Bob Jones Univ. v. United States*, 461 U.S. 574 (1983). So long as the state can apply neutral discrimination laws without delving too deeply into religious doctrine, these laws should be applied to churches. *E.E.O.C. v. Mississippi College*, 626 F.2d 477 (5th Cir. 1980).

Refusing a black woman the protection provided by Title VII unduly burdens her free exercise right to pursue her faith as a minister and discriminates against her on account of her religion. *McDaniel v. Paty*, 435 U.S. 618 (1978) establishes that the government cannot exclude clergy from the opportunities that government provides. Title VII protection from employment discrimination is a major government benefit. By conditioning that right on non-ministerial status, the government intrudes on the individual's free exercise right to pursue the ministry.

Just as it is unacceptable to force a clergy member to choose between ministerial status and elective office, it is unacceptable to force a clergy member to choose between ministerial status and protection from discrimination. Therefore, refusing to provide a female black Methodist minister with the statutory protections of Title VII, intrudes on her free exercise of religion.

II. The Seventh Circuit Failed To Follow Binding Supreme Court Precedent When It Refused To Apply *Employment Division v. Smith.*

Smith holds that neutral, generally applicable statutes defeat claims for mandatory judicial exemptions for free exercise. *Employment Division v. Smith*, 494 U.S. 872 (1990), *reh'g denied*, 496 U.S. 913 (1990). Title VII is precisely such a neutral, generally applicable law. Even if the Court finds that the Religious Freedom Restoration Act, 42 U.S.C. § 2000bb (1994) applies to this case, the petitioner prevails because she has presented a compelling state interest: eradicating racial discrimination. Hence this case raises important constitutional issues about the proper standards for evaluating mandatory free exercise claims.

III. The Seventh Circuit's Ruling Adds To The Existing Split In The Circuits Over Whether Courts Can Apply Neutral Contract Principles To Rule On Contract Disputes Between Clergy And Their Religious Employers.

The respondents not only discriminated against petitioner, they also breached her employment contract by

failing to follow agreed procedures. Although the complaint may be somewhat inartfully drafted, it alleges facts that raise the breach of contract issue when it alleges that the respondents failed to follow certain settled procedures. The circuit courts are split on the issue of whether courts can apply neutral contract principles to rule on clergy contract disputes. The D.C. Circuit has held that a Methodist minister may proceed with a suit against the church conference for breach of an oral employment contract, because applying neutral contract principles will not violate the first amendment religion clauses. *Minker v. Baltimore Annual Conference of United Methodist Church*, 894 F.2d 1354 (D.C. Cir. 1990). In contrast, the First Circuit has held that courts cannot constitutionally resolve contract disputes between clergy and religious institutions. *Natal v. The Christian and Missionary Alliance*, 878 F.2d 1575 (1st Cir. 1989). Similar splits exist among various state courts that have considered this issue as well. *Contrast, e.g., Molberg v. Apostolic Bible Institute*, 1992 Minn. App. LEXIS 354 (1992) (holding that the first amendment did not prevent judicial review of a breach of contract claim); and *Music v. United Methodist Church*, 864 S.W.2d 286 (Ky. 1993) (holding that the "neutral principles" test should not be applied to clergy contract cases).

The Seventh Circuit's ruling in this case adds to the confusion created by the split in the circuits over whether courts can apply neutral contract principles to resolve clergy contract disputes. It relies on *Serbian Eastern Orthodox Diocese v. Milivojevich*, 426 U.S. 696 (1976) for the proposition that courts cannot get involved in disputes involving churches and their clergy.

The split in the circuits reflects two separate lines of Supreme Court cases: one line that favors deference to hierarchial church authority and another line that permits government to apply neutral principles. *Compare Jones v. Wolf*, 443 U.S. 595 (1979) (holding that courts can constitutionally resolve church disputes so long as the courts apply neutral principles) with *Serbian Eastern Orthodox Diocese v. Milivojevich*, 426 U.S. 696 (1976) (holding that courts must defer to the church hierarchy in resolving these disputes). Thus the split in the circuits and the state courts results from two different theories of how to approach the separation of church and state: with deference to church hierarchy, or with neutral principles of law.

CONCLUSION

In sum, this case is ripe for review by the Supreme Court because it presents important constitutional issues about church employers' duty not to discriminate on the basis of race, about the scope of free exercise exemptions, and about the role of neutral principles in resolving church disputes. Moreover, the Seventh Circuit apparently failed to follow binding Supreme Court precedent when it refused to apply *Employment Division v. Smith*, 494 U.S. 872 (1990), *reh'g denied*, 496 U.S. 913 (1990). Finally, the Seventh Circuit's decision aggravates an existing split in the circuits. Therefore, the Court should grant the petition.

The petition for a writ of certiorari should be granted.

Respectfully submitted,

P. JANE RUTHERFORD
Counsel of Record
DEPAUL UNIVERSITY COLLEGE OF LAW
25 E. Jackson Blvd.
Chicago, IL 60604
(312) 362-5269

TIMOTHY P. O'NEILL
THE JOHN MARSHALL LAW SCHOOL
315 S. Plymouth Court
Chicago, IL 60604

Counsel for Petitioner

In the

United States Court of Appeals

for the Seventh Circuit

No. 93-2157

DARREYL N [SIC]. YOUNG,

Plaintiff-Appellant,

v.

THE NORTHERN ILLINOIS CONFERENCE
OF UNITED METHODIST CHURCH,
THE BOARD OF ORDAINED MINISTRY AND
R. SHELDON DUECKER, as the Presiding
Bishop of the BOARD OF ORDAINED MINISTRY,

Defendants-Appellees.

Appeal from the United States District
Court for the Northern District of Illinois,
Eastern Division. No. 92 C 7202 –
Charles R. Norgle, Sr., *Judge.*

ARGUED JANUARY 4, 1994 –
DECIDED APRIL 7, 1994

Before FAIRCHILD, MANION, and KANNE, *Circuit Judges.*

KANNE, *Circuit Judge.* Darreyl Young is a black female. After several years serving as a probationary minister of the United Methodist Church, she applied for a promotion to the position of "Clergy Member in Full Connection" or "Elder." A review panel of the Northern Illinois

Conference of the United Methodist Church denied her request for a promotion and terminated her employment on March 4, 1992.

She notified the EEOC of her termination. It found no probable cause to proceed against the United Methodist Church.[1] It issued her a right to sue letter, and she filed a complaint in the district court.

Young's complaint alleges race discrimination, sex discrimination, and retaliation in violation of 42 U.S.C. § 2000e, *et seq.* She claims that she was denied the promotion and fired because of her race and sex, and because of her "opposition to [the United Methodist Church's] discriminatory practices." Specifically, she claims that the United Methodist Church did not follow the procedure it had previously "always" followed in such cases.

She requested the district court to grant her several forms of relief. First, she asked the court to order the United Methodist Church to reinstate her as a probationary minister and award her back pay and other benefits. Second, she asked the court to order the United Methodist Church to re-examine her application. Third, she sought compensatory damages, punitive damages, fees, and costs.

The United Methodist Church responded with a motion to dismiss for lack of subject matter jurisdiction. It claimed that the First Amendment forbids government interference with "the internal ecclesiastical workings and discipline of religious bodies." The district court

---

[1] The defendants-appellees are referred to collectively as the "United Methodist Church."

found that it could not decide the case without reaching the constitutional issue, and that the First Amendment denied it subject matter jurisdiction. It granted the motion to dismiss on that basis.

This appeal followed and calls for an examination of the district court's constitutional ruling, that the First Amendment denied it subject matter jurisdiction. Therefore we review the court's motion to dismiss *de novo. Sequoia Books, Inc. v. Ingemunson,* 901 F.2d 630, 633 (7th Cir. 1990).

Young, to prevail, must show that the First Amendment does not preclude subject matter jurisdiction, as the district court found. To do so, she argues that "there is no doubt" that Title VII is applicable to religious organizations. In support, Young cites to *E.E.O.C. v. Mississippi College,* 626 F.2d 477 (5th Cir. 1980). She claims in her brief that this case "applied Title VII to [a] religious organization [ ], the First Amendment notwithstanding." This is a misstatement of the case. The Fifth Circuit did not act "notwithstanding" the Free Exercise Clause. Rather it found that the Free Exercise Clause was not implicated because "the College is not a church and its faculty members are not ministers." *Id.* at 485. The Fifth Circuit in *Mississippi College* cited to its own prior case, *McClure v. Salvation Army,* 460 F.2d 553, 559-60 (5th Cir.), *cert. denied,* 409 U.S. 896, 93 S. Ct. 132 (1972), which had "concluded that matters touching the relationship between a church and its ministers, including the selection of a minister, determination of salary, and assignment of duties and location, are matters of church administration and government and thus purely of ecclesiastical cognizance." *Mississippi College,* 626 F.2d at 485.

Young attempts to read *Mississippi College* as establishing a general proposition that Title VII "applies to religious organizations." But the case stands for no such thing. It explicitly exempts "matters touching the relationship between a church and its ministers." And that is precisely what is at stake in this case.

In support of her general claim that Title VII may be applied to religious organizations, Young also cites to *Rayburn v. General Conf. of Seventh Day Adventists*, 772 F.2d 1164, 1169 (4th Cir. 1985), to demonstrate that the elimination of discrimination is a compelling state interest "of the highest order." This is unquestionably the case. But *Rayburn*, after noting this truism, goes on to state that:

> [C]ourts must distinguish incidental burdens on free exercise in the service of a compelling state interest from burdens where the "inroad on religious liberty" is too substantial to be permissible. . . . This case is of the latter sort: *introduction of government standards to the selection of spiritual leaders would significantly, and perniciously, rearrange the relationship between church and state.* While an unfettered church may create minimal infidelity to the objective of Title VII, it provides maximum protection of the First Amendment right to the free exercise of religious beliefs.

Id. at 1169 (emphasis added). In other words, in a direct clash of "highest order" interests, the interest in protecting the free exercise of religion embodied in the First Amendment to the Constitution prevails over the interest in ending discrimination embodied in Title VII.

In *Rayburn* the plaintiff alleged sex discrimination when her application to serve as an "associate in pastoral care" was rejected. The court noted that even though the plaintiff was not seeking a position as an ordained minister, the "Ministerial exception" the Fifth Circuit enunciated in *McClure* "does not depend upon ordination but upon the function of the position." *Rayburn* at 1168.

Having determined that the position was "important to the spiritual and pastoral mission of the church," the *Rayburn* court held that "the free exercise clause of the First Amendment protects *the act of a decision* rather than a motivation behind it. In these sensitive areas, the state may no more require a minimum basis in doctrinal reasoning than it may supervise doctrinal content." *Id.* at 1169 (emphasis added). *See also Scharon v. St. Lukes Episcopal Presbyterian Hosp.*, 929 F.2d 360, 363 (8th Cir. 1991) (adopting "act of decision" language when affirming summary judgment against plaintiff who alleged age and sex discrimination when fired from position as chaplain).

Contrary to Young's assertions *Rayburn* and *Mississippi College* actually indicate that Title VII may *not* be applied in cases such as the one before us because the First Amendment will not allow it. Nevertheless, Young forges ahead claiming that her complaint "only involves secular issues and will not require any entanglements over religious issues." The district court found to the contrary, relying in part on the case of *Serbian Eastern Orthodox Diocese v. Milivojevich*, 426 U.S. 696, 717, 96 S. Ct. 2372 (1976), for the proposition that "the composition of a church's hierarchy is also primarily an ecclesiastical matter left for the church's sole resolution."

Young attempts to distinguish *Milivojevich* by arguing that it holds only that a First Amendment violation occurs when a court "probes deeply" and makes "extensive inquiry into religious law and policy" when reviewing decisions of the "Highest Ecclesiastical Tribunal within a Church Hierarchical Polity." If Young's position were correct, we would have to determine how "deep" and how "extensive" an analysis the district court was required to make before we could decide if the free Exercise Clause is implicated.

The *Milivojevich* case demonstrates that such an analysis is unwarranted. In *Milivojevich* the Illinois Supreme Court had overturned the defrocking and suspension of an Orthodox bishop by his own church. The Illinois court based its decision on certain language in the case of *Gonzalez v. Archbishop*, 280 U.S. 1, 50 S. Ct. 5 (1929), which stated that the federal courts could review ecclesiastical decisions where there was "fraud, collusion, or arbitrariness." The court found that the church in that case had made an arbitrary decision. Milivojevich alleges, exactly as Young does in the instant case, that his church "had not followed its own laws and procedures in arriving" at its decision. *Milivojevich*, 426 U.S. at 713.

In reversing, the Supreme Court first noted that the "arbitrariness" exception in *Gonzalez* was dicta and had no force. Therefore, the binding precedent was the old rule set out in *Watson v. Jones*, 13 Wall 679, 20 L.Ed. 666 (1872), which held that:

> It is of the essence of religious unions, and of their right to establish tribunals for the decision of questions arising among themselves, that those decisions should be binding in all cases of

> ecclesiastical cognizance, subject only to such appeals as the organism itself provides for.

Watson, 13 Wall at 728-29. Therefore, the *Milivojevich* court concluded,

> [n]o "arbitrariness" exception – in the sense of an inquiry whether the decisions of the highest ecclesiastical tribunal of a hierarchical church complied with church laws and regulations – is consistent with the constitutional mandate that civil courts are bound to accept the decisions of the highest judicatories[2] of a religious organization of hierarchical polity on matters of discipline, faith, internal organization, or ecclesiastical rule, custom, or law.

Milivojevich at 2382.

The Court went on to hold that allowing review of "arbitrary" decisions, which in this sense means decisions which do not comply with a church's own rules or practices, is:

---

[2] The language "highest judicatories" is derived from *Watson*, 80 U.S. at 727, which referred to the "highest . . . church judicatories to which the matter has been carried." In other words, it refers to the body internal to the church which made the final disposition of the matter which subsequently gave rise to the case at hand. It does *not* mean that a civil court need only defer to the "Highest" decision-making body of the church and may ignore the others. Rather, it means that the civil court must defer to the highest body to which the matter had been carried prior to reaching the civil court. As the Sixth Circuit pointed out in *Lewis v. Seventh Day Adventists Lake Region Conf.*, 978 F.2d 940, 943, to attempt to do otherwise would "require a civil court to conduct a review of ecclesiastical law to determine which tribunal is the highest. This is exactly the type of inquiry which the First Amendment forbids."

> [E]xactly the kind of inquiry that the First Amendment prohibits. Recognition of such an exception would undermine the general rule that religious controversies are not the proper subject of civil court inquiry, and that a civil court must accept the ecclesiastical decisions of church tribunals as it finds them.

Id. In other words, religious bodies may make apparently arbitrary decisions affecting the employment status of their clergy members and be free from civil review having done so.

Young also refers to the fact that *Milivojevich* "left open the issue" of whether a church decision may be reviewed in the case of "fraud or collusion."[3] Whatever unlikely significance this "open issue" might have in some hypothetical case, it is certainly not implicated in this case because Young has alleged no fraud or collusion.

After summarizing *Milivojevich*, Young asserts that "it is evident that [it] does not foreclose review" of her complaint. In so arguing, Young selects language which would appear to allow civil court review of decisions made by religious bodies, so long as that review is not an

---

[3] This "open issue" is a remnant of the dicta Justice Brandeis left in his opinion in *Gonzalez*, which indicated that civil courts could review the decisions of "ecclesiastical tribunals" in the case of arbitrariness, fraud or collusion. 50 U.S. at 7. The court in *Milivojevich* explicitly eliminated the arbitrariness exception. As to the other exceptions, it did not say "whether or not there is room for 'marginal civil court review' under the narrow rubrics of 'fraud' or 'collusion' when courts act in bad faith for secular purposes. . . . " 426 U.S. at 713. *Milivojevich* merely leaves open, but does not endorse, the possibility that limited review would be available in cases of fraud or collusion.

"extensive inquiry" into "religious law and polity." *Id.* at 709. From this language Young claims that a review of the procedures which led to her firing would not have required the district court to "probe deeply enough so as to decide religious law governing church polity."

However, Young has omitted reference to the passages which define what constitutes such a forbidden inquiry, which occur a few pages later in the *Milivojevich* opinion. We have cited those passages above. *Milivojevich*, read in its entirety, holds that civil court review of ecclesiastical decisions of church tribunals, particularly those pertaining to the hiring or firing of clergy, are *in themselves* an "extensive inquiry" into religious law and practice and hence forbidden by the First Amendment. Young's argument, that Title VII may be applied to decisions by churches affecting the employment of their clergy, is fruitless.

Although this is the first time this precise issue has been presented to us, its resolution is straightforward. As we have indicated, *Milivojevich* holds that the Free Exercise Clause of the First Amendment forbids a review of a church's procedures when it makes employment decisions affecting its clergy. *Id.* at 2382. In fact, in *Milivojevich* it was the precise issue of a change in internal procedure, as in this case, which the Supreme Court refused to review. The Supreme Court found this to be "exactly the kind of inquiry that the First Amendment prohibits." *Id.* The inquiry Young seeks is no different, and it too is prohibited.

It was no help for Young to selectively cite and thus misleadingly apply the relevant precedents, or to cite to

cases yet ignore their language which clearly states that what she asks the federal courts to do is *per se* forbidden. To accept the position advanced by Young would require us to cast a blind eye to the overwhelming weight of precedent going back over a century in order to limit the scope of the protection granted to religious bodies by the Free Exercise Clause. There is nothing advocated by Young which raises any doubt about the correctness of the district court's decision. The dismissal is AFFIRMED.

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

Darreyl N [sic]. YOUNG, Plaintiff,

v.

The NORTHERN ILLINOIS CONFERENCE OF UNITED METHODIST CHURCH, The Board of Ordained Ministry, and R. Sheldon Duecker, as the presiding Bishop of The Board of Ordained Ministry, Defendants.

No. 92 C 7202.

United States District Court,
N.D. Illinois, E.D.

April 19, 1993.

Gerald A. Goldman, Arthur R. Ehrlich, Goldman & Marcus, Chicago, IL, for plaintiff.

Samuel W. Witwer, Jr., Gregory Nathan Freerksen, Jennifer Kae Poltrock, Witwer, Burlage, Poltrock & Giampietro, Chicago, IL, for defendants.

OPINION AND ORDER

NORGLE, District Judge:

Before the court is the defendants' motion to dismiss pursuant to Rules 12(b)(1) and 12(b)(6) of the Federal Rules of Civil Procedure. For the reasons stated below, the motion is granted.

FACTS

Plaintiff Darreyl N [sic]. Young ("Young"), a female black African-American, served as a probationary minister for the United Methodist Church in Chicago, Illinois. For four years she acted as a pastor and preached

sermons for the church in this capacity. According to the complaint, she received excellent references and ratings from her superiors during those four years. When Young applied for a position as "Elder," or "Clergy Member in full Connection," ("Elder") within the Methodist Church, she received a favorable recommendation from her supervisor for this position. In response to Young's application for the position of Elder, the defendants Northern Illinois Conference of United Methodist Church, the Board of Ordained Ministry (the "Board"), and the Board's presiding bishop, R. Sheldon Duecker (collectively, "defendants") established a panel to review Young's application. Young maintains that there were no black female members on this review panel. On March 24, 1992 the defendants denied Young the appointment as an Elder on her first attempt, and discontinued Young as a minister in the church without recommending that Young's status as a probationary minister continue. The Board rejected, although it had available, the favorable recommendation of Young's supervising Elder. Young additionally asserts that, although it is a qualification for becoming an Elder that the applicant have preached or given a sermon in the past, the defendants criticized Young's preaching skills without having the benefit of ever hearing her sermons. Young does not allege whether there are any black African-American or female Elders in the church.

Young filed suit on October 29, 1992 alleging that the defendants' actions constituted sex and race discrimination, and were taken in retaliation for her advocacy of minority rights and her vocal criticism of the church on minority issues, all in violation of 42 U.S.C. § 2000e, *et*

seq. ("Title VII"). After Young filed a timely complaint with the Equal Employment Opportunity Commission ("EEOC"), the EEOC entered a final decision on July 30, 1992, and issued a right to sue letter around August 1992.

Young claims that other probationary ministers seeking appointment as an Elder have always had representatives of their sex and race on the Board's review panel; that the Board has never discontinued other probationary members on their first attempt to obtain the Elder position; and that the Board always followed the recommendation of supervising Elders when making the promotion determination. As a consequence of the Board's determination, Young has been removed from her church and has been denied any opportunity for advancement within the Methodist Church. Young seeks in this suit, in addition to compensatory and punitive damages for her loss of pay and her emctional distress, that the court order her reinstatement as a probationary minister and that the court order a new review of her application for the Elder position to accordance with the defendants' "usual and customary practices. . . . "

Concerned with the requested relief, the defendants filed the present motion to dismiss on November 20, 1992. Defendants primarily assert that the court is without jurisdiction to adjudicate the claims brought against them and also that the complaint fails to state a claim.

DISCUSSION

Lack of subject matter jurisdiction is appropriately raised in a motion to dismiss under Fed.R.Civ.P. 12(b)(1). *Barnhart v. United States*, 884 F.2d 295, 296 (7th Cir. 1989),

cert. denied, 495 U.S. 957, 110 S.Ct. 2561, 109 L.Ed.2d 743 (1990). Additionally, the court will grant a motion to dismiss for failure to state a claim if there is no set of facts upon which to grant legal relief. *Ross v. Creighton Univ.*, 957 F.2d 410, 413 (7th Cir.1992). The court accepts the allegations in Young's complaint as true without, of course, vouching for their veracity as it must when deciding a motion to dismiss pursuant to Fed.R.Civ.P. 12(b)(6). *Johnson v. Martin*, 943 F.2d 15, 16 (7th Cir.1991).

The defendants' position is that granting Young's request for relief in this case would violate the first amendment's protection of the free exercise of religion and thus the first amendment deprives the court of jurisdiction over Young's claims. The court should avoid the constitutional quesiton. Indeed, federal courts are counseled to skirt constitutional questions if reaching them is unnecessary to deciding the case. *See International Ass'n of Machinists v. Street*, 367 U.S. 740, 749-50, 81 S.Ct. 1784, 1789-90, 6 L.Ed.2d 1141 (1961). Nevertheless, if the defendants are employers engaged in an industry affecting commerce within the breadth of § 701(b), (f), and (h) of Title VII, 42 U.S.C. § 2000e(b), (f), (h), and sex or race entered the decision to discontinue Young as a probationary minister, then this would activate Title VII's edicts. Therefore, a potential conflict with the religion clauses of the first amendment becomes apparent because the court's adjudication of a sex- or race-based discrimination claim in this instance may substantially entangle the court in the church's religious mission, doctrines, activities, and hierarchy. *Dolter v. Wahlert High School*, 483 F.Supp. 266, 270-71 (N.D.Iowa 1980). The complaint reveals that the relief Young requests includes an order to

reinstate Young to her probationary ministerial position and force the defendants to conduct a new review of her application for the Elder position in the Methodist church. Presumably this would include ordering the makeup of the committee as suggested by Young.

This creates a predicament. By granting Young relief, the court may be getting entangled in the religious affairs of the defendants. On the other hand, courts cannot immunize from governmental regulations all types of religious activity, especially from laws designed to protect health, safety, morality, and the general welfare. *See* Gary C. Leedes, *Court-Ordered Exemptions to Secure Religious Liberty*, 21 U.RICH.L.REV. 335, 338 (1987). It cannot be denied that there exists a strong federal interest and court commitment to eradicating discrimination in this country. *Cf. Roberts v. United States Jaycees*, 468 U.S. 609, 621-23, 104 S.Ct. 3244, 3251-53, 82 L.Ed.2d 462 (1984) (state's interest in eliminating discrimination outweighed Jaycees' freedom of association); Susan L. Pacholski, *Title VII in the University: The Difference Academic Freedom Makes*, 59 U.CHI.L.REV. 1317, 1318 (1992) (Title VII's policy of "complete relief" would be subverted by undue deference to a university's right to academic freedom). It is the clash between social legislation aimed at remedying discrimination and first amendment rights that is the concern in the present case.

The court should first determine whether there is a clear expression of an affirmative intention of Congress that religious organizations are covered by Title VII. *See N.L.R.B. v. Catholic Bishop of Chicago*, 440 U.S. 490, 504, 99 S.Ct. 1313, 1320, 59 L.Ed.2d 533 (1979). The court concludes that it is not deprived of jurisdiction to entertain

Title VII claims merely because the defendants are religious entities. The statute recognizes that claims for discrimination in employment on account of race, national origin, or sex are cognizable against religious entities. *Rayburn v. General Conference of Seventh-Day Adventists,* 772 F.2d 1164, 1166 (4th Cir.1985) ("Title VII does not confer upon religious organizations a license to make [hiring decisions] on the basis of race, sex, or national origin"), *cert. denied,* 478 U.S. 1020, 106 S.Ct. 3333, 92 L.Ed.2d 739 (1986); *E.E.O.C. v. Pacific Press Pub. Ass'n,* 676 F.2d 1272, 1278 (9th Cir.1982) (Title VII applied to editorial secretary position in nonprofit religious publishing house); *E.E.O.C. v. Southwestern Baptist Theological Seminary,* 651 F.2d 277, 287 (5th Cir.1981) (Title VII applicable to administrative and support staff of seminary), *cert. denied,* 456 U.S. 905, 102 S.Ct. 1749, 72 L.Ed.2d 161 (1982); *E.E.O.C. v. Mississippi College,* 626 F.2d 477, 486-89 (5th Cir.1980) (secular teacher in church-approved school), *cert. denied,* 453 U.S. 912, 101 S.Ct. 3143, 69 L.Ed.2d 994 (1981); *Elbaz v. Congregation Beth Judea, Inc.,* 812 F.Supp. 802, 803-04 (N.D.Ill.1992) (education director for religious school); *Whitney v. Greater N.Y. Corp. of Seventh-Day Adventists,* 401 F.Supp. 1363, 1368 (S.D.N.Y.1975) (typist-receptionist for Seventh-Day Adventist Church). This is so because Congress only exempted religious organization, entities, or educational facilities from claims based on *religious discrimination* and only under certain limited circumstances. *See* 42 U.S.C. §§ 2000e-1, 2000e-2; *Prime v. Loyola University of Chicago,* 803 F.2d 351, 357-58 (7th Cir.1986). This exemption did not cover race-, national origin-, or sex-based claims. This evidences that Congress intended Title VII to apply to religious entities with only

some specific exemptions. *See Rayburn*, 772 F.2d at 1167 (wording of statute and history behind it examined).

No other construction of Title VII will remove the constitutional question. *See Machinists*, 367 U.S. at 749-50, 81 S.Ct. at 1789-90. Although the parties never addressed whether the defendants in this case were collectively acting as employers under Title VII in making the promotion decision or whether Young is an employee, it is conceivable that church officials are not acting as "employers" within the definition of Title VII when making pastoral decisions, and that ministers are not "employees" in the traditional sense. Nevertheless, § 701 defines employer and employee broadly. *Chavero v. Local 241, Division of Amalgamated Transit Union*, 787 F.2d 1154, 1156 (7th Cir.1986). At least one court believes that religious entities are employers engaged in an industry affecting commerce under Title VII. *McClure v. Salvation Army*, 460 F.2d 553, 554 (5th Cir.), *cert. denied*, 409 U.S. 896, 93 S.Ct. 132, 34 L.Ed.2d 153 (1972). Furthermore, the complaint does not describe the duties of a probationary minister or an Elder, and the complaint reveals that Young received compensation for her services. Accordingly, the court assumes that a traditional employer-employee relationship existed. Therefore, there is no other construction of the statute that is fairly possible by which the court can avoid the constitutional question.

As a consequence, it becomes Title VII's application to Young's employment as a minister that is at issue. The case law suggests that the application of Title VII's race and sex discrimination ban is limited to *nonclergy* employees of religious organizations. *See Rayburn*, 772 F.2d at 1165 (involving applicant for a pastoral position);

McClure, 460 F.2d at 554-55 (ordained minister); *see also* A. Larson & L. Larson, Employment Discrimination ¶ 5.37(b) at 2-112 & n. 25 (citing cases). These decisions rest on the assumption that an application of the law to these church positions would violate the first amendment. The reasoning of these decisions is also that courts may not question a church's ruling on matters of religious doctrine or authority. *See Presbyterian Church v. Mary Elizabeth Blue Hull Memorial Presbyterian Church*, 393 U.S. 440, 89 S.Ct. 601, 21 L.Ed.2d 658 (1969); *Kedroff v. St. Nicholas Cathedral of Russian Orthodox Church*, 344 U.S. 94, 73 S.Ct. 143, 97 L.Ed. 120 (1952).

In the present case, however, there are no religious beliefs specifically at issue. For instance, the complaint does not facially attack the Methodist Church's view, if any, that females or black African-American individuals cannot obtain the Elder position. Assuming the facts are in Young's favor, female black African-American Elders are present in the Northern Illinois Conference of United Methodist Church and there is no denominational bar to their presence. It is merely because the instant hiring decision was allegedly based on impermissible factors that Young asserts her claim in the courts. Furthermore, it is Young's position that the court is not getting tangled in a religious morass but is solely reviewing secular aspects of the defendants' decision. In other words, by requiring the defendants to follow their customary employment procedures, which do not involve ecclesiastical considerations, the court is merely concerning itself with secular procedural matters and is granting Young secular relief. Therefore, Young maintains, the case does not concern church doctrine.

Young supports her position with *Kaufmann v. Sheehan*, 707 F.2d 355, 358-59 (8th Cir.1983). In that case the Eighth Circuit observed that a narrow "fraud" or "collusion" exception to the bar of civil court review of church tribunals may not entirely foreclose actions brought against a church. *Id.* at 358. Nevertheless, even the *Kaufmann* court held that that possible exception was inapplicable because the plaintiff was a priest, and the complaint concerned matters involving church hierarchy. *Id.* at 358-59. The court determined those issues did not deal with secular matters. *Id.* "While there may be some secular aspects to employment and conceivably even to the priesthood or clergy, it is apparent that the priest or other member of the clergy occupies a particularly sensitive role in any church organization." *Id.* The case *sub judice* likewise involves a church clergymember and matters involving church hierarchy and, for that reason, is in line with the *Kaufmann* holding. Additionally, Young's Title VII claims cannot be construed to contain allegations of combination, conspiracy, or concerted action, as in *Kaufmann*, which could form a colorable basis for asserting the fraud or collusion exception.

The real focus is whether to afford the defendants autonomy in decisionmaking in areas involving church hierarchy or governance. Churches possess ultimate power to decide matters of governance, faith, and doctrine without governmental interference. *Kedroff*, 344 U.S. at 119, 73 S.Ct. at 156. The composition of a church's hierarchy is also primarily an ecclesiastical matter left for the church's sole resolution. *Serbian Eastern Orthodox Diocese v. Milivojevich*, 426 U.S. 696, 717, 96 S.Ct. 2372, 2384, 49 L.Ed.2d 151 (1976). The concern is, if this case

proceeds, the court must face intent and pretext defenses which may cause it to pass judgment on religious beliefs. Young asks the court to intervene in a dispute decided by the United Methodist Church's clergy evaluation process, to review work product, and to review the reasoning of the Board of Ordained Ministry. Under *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802-03, 93 S.Ct. 1817, 1824-25, 36 L.Ed.2d 668 (1973), the court would, by necessity, determine whether the defendants' reasons for the decision, as Young states in the complaint as being that she gave "bad sermons," are merely a sham. *See Sarsha v. Sears, Roebuck and Co.*, 796 F.Supp. 1132, 1135 (N.D.Ill.1992). The court is not competent to make that determination. Resolving the sex and race claims necessarily involves inquiry into the good faith of the defendants; therefore, the "very process of inquiry" may infringe first amendment rights. *Scharon v. St. Lukes Episcopal Presbyterian Hosp.*, 929 F.2d 360, 363 (8th Cir.1991). Furthermore, reinstatement into the ministry itself involves court intrusion, surveillance, and supervision of the church's operation.

These same concerns were articulated in *Hutchison v. Thomas*, 789 F.2d 392 (6th Cir.), *cert. denied*, 479 U.S. 885, 107 S.Ct. 277, 93 L.Ed.2d 253 (1986), as a basis for dismissing a claim by a Methodist minister who challenged his forced retirement. The minister maintained that the United Methodist Church expelled him through fraudulent, collusive, or arbitrary application of the church's rules, laws, and doctrinal statements. The claims included defamation, intentional infliction of emotional distress, breach of contract, and loss of consortium. *Id.* at 393. The

Sixth Circuit determined that inquiring into the employment relationship between the minister and church impermissibly immerses the court in a review of religious tenets, rules, and regulations, and would involve a review of internal discipline and government. Because these matters involve who will preach from the pulpit and who will occupy church parsonage, courts must allow churches to decide these questions without court interference. *Id.* at 394; *see also Lewis v. Lake Region Conference of Seventh Day Adventists*, 779 F.Supp. 72, 77 (E.D.Mich.1991) (claims by a minister and spouse alleging breach of contract, promissory estoppel, intentional infliction of emotional distress, and derivative spousal claim dismissed), *aff'd*, 978 F.2d 940 (6th Cir.1992).

In *McClure*, the Fifth Circuit held that title VII could not constitutionally reach a decision affecting the church-minister relationship of the Salvation Army. The court stated:

> The Salvation Army is a church and Mrs. Billie B. McClure is one of its ordained ministers. . . . Restricting our decision to the church-minister relationship and expressly refraining from any decision as to other church employees of a type not involved in this controversy, we affirm the judgment rendered below.

McClure, 460 F.2d at 554-55. The court reasoned that "[m]atters touching [the relationship between an organized church and its ministers] must necessarily be recognized as of prime ecclesiastical concern." *Id.* at 558-59. Other cases include *Minker v. Baltimore Annual Conference of United Methodist Church*, 894 F.2d 1354, 1358

(D.C.Cir.1990) (minister barred from bringing discrimination suit against church under Age Discrimination in Employment Act, 29 U.S.C. § 621, *et seq.*); *Rayburn*, 772 F.2d at 1172 (female church pastor barred from bringing Title VII claim of sexual and racial discrimination).

Accordingly, cases "exempting" religious institutions from Title VII rest on the observation that the employee is engaged in activities traditionally considered ecclesiastical or religious. *Southwestern Baptist*, 651 F.2d at 287. Imposing court scrutiny on every decision of a church which touches on its ministers places an excessive burden on the autonomy of religious institutions to choose its leaders and preachers. "[I]ntroduction of government standards to the selection of spiritual leaders would significantly, and perniciously, rearrange the relationship between church and state." *Rayburn*, 772 F.2d at 1169. As one commentator noted, the "[b]urden on [a church's] right to autonomy [in religious matters] is measured by the proximity of the employment relationship to the central mission and purpose of the religious organization." Mark F. Kohler, Comment, *Equal Employment or Excessive Entanglement? The Application of Employment Discrimination Statutes to Religiously Affiliated Organizations*, 18 Conn.L.Rev. 581, 611 (1987). The cases recognize this relationship. As a result, "[w]hen churches expand their operations beyond the traditional functions essential to the propagation of their doctrine," *Southwestern Baptist*, 651 F.2d at 285, and employ individuals to perform primarily non-pastoral or secular functions, the burden of a court's intrusion on a church's autonomy is minimal and the employers are subject to Title VII. But when religious

entities decide to employ persons to perform tasks traditionally ecclesiastical or that advance the institution's religious mission, courts must refrain from interfering in these matters. The cases make clear that not every employment relationship between a church or other religious entity and its employees is a matter exclusively quartered in the ecclesiastical. *See id.* at 287. Courts must inevitably inquire into or determine whether one is working in an ecclesiastic capacity. Thus, whether an employee is hired for and is involved in primarily – if not exclusively – religious rather than secular functions becomes the defining principle for application of Title VII to religious institutions. That inquiry, however, is not as burdensome an entanglement as forcing a church to accept an individual into its ranks, or to proceed with discovery into whether the plaintiff was a good parishioner. Thus the formulation is not a formidable one. *See, e.g., id.* at 283.

In the present case, there is a close proximity between the mission of the Methodist Church and Young's position. The complaint acknowledges the preaching function even of Young's position as a probationary minister. When it comes to establishing the criteria for determining and then making the determination regarding who should preach from the pulpit, comfort the dying, visit the imprisoned, discuss morality, set an example for all to see, explain church dogma, expound on the meaning of faith, hope and charity, and carry on the mission of the church, such decisions are wisely and constitutionally left to the wearers of the religious rather than the judicial robe. It therefore becomes prudent to avoid the temptation to get involved in the religious

affairs of the defendants; courts should avoid questions pertaining to a church's governance or hierarchy. Whether this conclusion is jurisdictional, or is merely a court-crafted exception to Title VII, claims against religious entities under Title VII involving employees engaged in the religious mission of the church and the propagation of its ecclesiastical pursuits must be dismissed.

CONCLUSION

For reasons stated above plaintiff's claim for compensatory and punitive damages, for reinstatement as a probationary minister, and for a court-ordered new review of her application for the Elder position is dismissed. The defendants' motion to dismiss is granted.

IT IS SO ORDERED.

STATUTES

Section 1331 of Title 28 provides in relevant part:

> The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.

28 U.S.C. § 1331.

Section 2000e-1 of the Equal Employment Opportunity Act provides, in relevant part:

> This subchapter shall not apply to an employer with respect to the employment of aliens outside any State, or to a religious corporation, association, educational institution, or society with respect to the employment of individuals of a particular religion to perform work connected with the carrying on by such corporation, association, educational institution, or society of its activities.

42 U.S.C. § 2000e-1.

Section 2000e-2 of the Equal Employment Opportunity Act provides in relevant part:

> (a) It shall be an unlawful employment practice for an employer–
>
> (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or
>
> * * *
>
> (m) Except as otherwise provided in this subchapter, an unlawful employment practice is

established when the complaining party demonstrates that race, color, religion, sex, or national origin was a motivating factor for any employment practice, even though other factors also motivated the practice.

42 U.S.C. § 2000e-2.

CONSTITUTIONAL PROVISIONS

The first amendment to the Constitution of the United States provides:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

U.S. Const. amend. I.

The fourteenth amendment to the Constitution of the United States provides in relevant part:

> Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty , or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. Const. amend. XIV.

(2)
FILED
SEP 14 1994
OFFICE OF THE CLERK

No. 94-0282

IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

DARREYL M. YOUNG,

Petitioner,

v.

THE NORTHERN ILLINOIS CONFERENCE OF UNITED METHODIST CHURCH, THE BOARD OF ORDAINED MINISTRY, and R. SHELDON DUECKER, as the Presiding Bishop of the BOARD OF ORDAINED MINISTRY,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

SAMUEL W. WITWER, JR.
Counsel of Record
JENNIFER K. POLTROCK
DANIEL G. MUSCA
WITWER, BURLAGE, POLTROCK & GIAMPIETRO
125 South Wacker Drive
Suite 2700
Chicago, Illinois 60606
(312) 332-6000

Attorneys for Respondents

Midwest Law Printing Co., Chicago 60611, (312) 321-0220

BEST AVAILABLE COPY

23 pp

COUNTER-STATEMENT OF QUESTION PRESENTED

Whether the courts below were correct in determining that the First Amendment's religious guaranties preclude the exercise of subject matter jurisdiction in a Title VII race and sex discrimination case where the Petitioner was an aggrieved probationary minister whose religious superiors found her unqualified for permanent clergy credentials?

TABLE OF CONTENTS

	PAGE
COUNTER-STATEMENT OF QUESTION PRESENTED	i
TABLE OF AUTHORITIES	iii
COUNTER-STATEMENT OF PROVISIONS INVOLVED	1
COUNTER-STATEMENT OF THE CASE	1
SUMMARY OF ARGUMENT	3
ARGUMENT	3
A. The Courts Below Ruled Correctly. Civil Courts Will Not Review Decisions of Religious Tribunals On Matters Purely Ecclesiastical, Especially Concerning The Qualification And Selection Of Clergy	3
B. Neither The So-Called "*Minker*" Exception Nor The Holding Of "*Employment Division v. Smith*" Requires Or Justifies A Contrary Result	7
CONCLUSION	9
APPENDIX 1	1a

TABLE OF AUTHORITIES

Cases	PAGE
DeMarco v. Holy Cross High School, 4 F.3d 166 (2nd Cir. 1993)	6
Employment Division v. Smith, 494 U.S. 872, 108 L. Ed. 2d 876 (1990)	8
Hutchinson v. Thomas, 789 F.2d 392 (6th Cir. 1986), *cert. denied*, 479 U.S. 885 (1986)	6
Kedroff v. St. Nicholas Cathedral, 344 U.S. 94 (1952)	5
McClure v. Salvation Army, 460 F.2d 553 (5th Cir. 1972), *cert. denied*, 409 U.S. 896 (1972)	6
Minker v. Baltimore Annual Conference of United Methodist Church, 894 F.2d 1354 (D.C. Cir. 1990)	1, 7, 8
Natal v. Christian and Missionary Alliance, 878 F.2d 1575 (1st Cir. 1989)	6
Rayburn v. Seventh Day Adventists, 772 F.2d 1164 (4th Cir. 1985)	6
Serbian Eastern Orthodox Diocese v. Milivojevich, 426 U.S. 696 (1976)	4
Scharon v. St. Lukes Episcopal Presbyterian Hospitals, 929 F.2d 360 (8th Cir. 1991)	6
Simpson v. Wells-Lemont Corporation, et al., 494 F.2d 490 (5th Cir. 1974)	7
Watson v. Jones, 13 Wal. 679, 20 L. Ed. 66 (1871)	5
Young v. Northern Illinois Conference of United Methodist Church, et al., 818 F. Supp. 1206 (N.D. Ill. 1993); *aff'd*, 21 F.3d 184 (7th Cir. 1994)	6

Statutory Provisions

United States Constitution—Amendment I 1

Equal Employment Opportunities Act,
42 U.S.C. Section 2000e-1 *et seq.* 1

Religious Freedom Restoration Act of 1993,
42 U.S.C. Section 2000bb *et seq.* 8

No. 94-0282

IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

DARREYL M. YOUNG,

Petitioner,

v.

THE NORTHERN ILLINOIS CONFERENCE OF UNITED METHODIST CHURCH, THE BOARD OF ORDAINED MINISTRY, and R. SHELDON DUECKER, as the Presiding Bishop of the BOARD OF ORDAINED MINISTRY,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

COUNTER-STATEMENT OF PROVISIONS INVOLVED

United States Constitution—Amendment I. "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; . . ."

COUNTER-STATEMENT OF THE CASE

Petitioner sought redress in the district court for alleged wrongful "discontinuation" from her status as a probationary minister (sometimes called a "minister on trial") of the United Methodist Church. Following evaluations by religious authorities within one of the Respondents, Northern Illinois Conference, Petitioner had been refused advancement to full status as an ordained elder clergy person. Her suit alleged job discrimination based on race and sex.

The Petition for Writ of Certiorari is accurate insofar as it avers that Petitioner, in her complaint below, alleged that her evaluation process was infected by unlawful discrimination in violation of Title VII of the Equal Employment Opportunities Act, 42 U.S.C. Section 2000e-1 *et seq.* However, the suggestion (Pet. at 3, 10-11) that the complaint below also pleaded a breach of contract claim is erroneous.[1]

---

[1] The Complaint (copy attached as Appendix 1 hereto) contains no allegation that any promise was made to Petitioner, written or verbal, or that any contractual breach occurred. In seeking belatedly to create a contract claim, Petitioner evidently aims at bringing this case within the reach of a narrow "clergy-contract" exception given qualified approval by the D.C. Circuit in *Minker v. Baltimore Annual Conference of United Methodist Church*, 894 F.2d 1354, 1360 (D.C. Cir. 1990). In support of this new theory

(Footnote continued on following page)

The task which Petitioner sought to place before the district court is revealed in the prayers for relief which accompanied each count of the Complaint; to-wit:

> "A. That Defendants be ordered to reinstate the Plaintiff as a Probationary Ministerial Member and that Plaintiff be awarded back pay and be compensated for the loss of other employment benefits.
>
> B. That Defendants be ordered to conduct a new review of the Plaintiff's application for 'Elder' or 'Clergy Member in Full Connection', and the Defendants be required to follow their usual and customary practices such as including other Black female Ministers or 'Clergy Members in Full Connection' on the panel which reviews her application . . . ."

(Appendix 1 hereto at Prayers for Relief, paragraphs A, B).

Respondents moved for dismissal, urging that the suit was in reality a quest for civil review of subjective judgments made by religious officials that a minister was unqualified to be continued or advanced as a minister of the Gospel. As such, the Respondents maintained, the district court could neither examine into the controversy nor could it fashion the requested relief without an affront to the free exercise of religion under the First Amendment. The district court agreed and dismissed the suit. (818 F. Supp.

---

[1] *continued*

of action, Petitioner relies on three paragraphs (Nos. 8A-8C) in Count II (disparate treatment/retaliation) of her Complaint to the effect that the religious defendants departed from certain traditional or customary practices and presumptions while considering her case. However, the difficulty of characterizing the case as a "contract action" is tacitly acknowledged by opposing counsel: "Although the complaint may be somewhat inartfully drafted, it alleges facts that raise the breach of contract issue when it alleges that the Respondents failed to follow certain settled procedures." (Pet. at 11) A fair reading of the Complaint cannot possibly support such an interpretation.

1206; Pet. App. at 11) The Seventh Circuit affirmed. (21 F.3d 184; Pet. App. at 1)

SUMMARY OF ARGUMENT

The rule governing this case, as the Seventh Circuit aptly stated, is "straight forward": the First Amendment precludes secular courts from exercising jurisdiction in wrongful termination suits brought by aggrieved clergy persons against their churches. This is true even where Title VII is invoked. Although the policies underlying the Equal Employment Opportunities Act are highly important, even these must yield to Constitutional requirements where a contrary approach would draw courts into disputes concerning the qualifications of ministers and the motives of religious officials. Because clergy are the "life-blood" of religious societies, decisions affecting their status must, under the First Amendment, be left to the churches. Finally, this case does not fit within the limited "breach of contract" exception recently formulated in a D.C. Circuit case, nor can the attempted suit fairly be described as resting upon "neutral" laws of general applicability when applied to clergy selection disputes. The holdings below are unassailable and review should be denied.

ARGUMENT

A. The Courts Below Ruled Correctly. Civil Courts Will Not Review Decisions Of Religious Tribunals On Matters Purely Ecclesiastical, Especially Concerning The Qualification And Selection Of Clergy.

The Petition for Writ of Certiorari gamely attempts to portray this as a novel case involving unsettled issues and inter-circuit conflicts requiring Supreme Court resolution. In reality, however, the Petition contains none of the fore-

going elements. Instead, it is but an effort to quarrel with a constitutional doctrine as clear and as firmly entrenched as any in our jurisprudence. The rule is unambiguous: where church-clergy relations are involved, courts will not interfere—even when ostensibly important statutory rights and public policies are invoked and pleaded. Not surprisingly, the decisions below encountered no difficulty in upholding this immutable principle.

The district court approached the case correctly. After analyzing the role it would have to play to hear the controversy, resolve disputed issues and supervise compliance with any relief granted, it rightly concluded that judicial intervention was constitutionally impermissible. 818 F. Supp. at 1210-11; Pet. App. at 19-20. Likewise, the Court of Appeals, after reviewing a long line of cases including this Court's teachings in *Serbian Eastern Orthodox Diocese v. Milivojevich*, 426 U.S. 696 (1976),[2] captured the essence of the matter as follows:

> "Although this is the first time this precise issue has been presented to us, its resolution is straightforward. As we have indicated, *Milivojevich* holds that the Free Exercise clause of the First Amendment forbids a review of a church's procedures when it makes employment decisions affecting its clergy."

21 F.3d at 187; Pet. App. at 9.

---

[2] While *Milivojevich* arose in a somewhat different factual setting, its message is clear-cut and has guided the lower courts in steering clear of cases involving clergy assignment or discipline. This Court said: "Nor is there any dispute that questions of discipline and the composition of the church hierarchy are at the core of ecclesiastical concern. . . ." 426 U.S. at 717. This Court continued by stating that disputes relating to the appointment and retention of clergymen are "quintessentially religious controversies whose resolution the First Amendment commits exclusively to the highest ecclesiastical tribunals of this hierarchical church." 426 U.S. at 720.

The familiar rule of deference exemplified by *Milivojevich* has its roots in decisions of this Court spanning well over a century. In *Watson v. Jones*, 13 Wal. 679, 20 L. Ed. 666 (1871), this Court stated:

> "This court . . . having no ecclesiastical jurisdiction, cannot revise or question ordinary acts of church discipline . . . We cannot decide who ought to be members of the church, nor whether the excommunicated have been justly or unjustly, regularly or irregularly cut off from the body of the church."

13 Wal. at 730.

Over time, this doctrine evolved from a mere rule of abstention to one of great force and constitutional magnitude. In *Kedroff v. St. Nicholas Cathedral*, 344 U.S. 94 (1952), this Court confirmed that the First Amendment's religious guarantees extend to:

> "the power [of churches] to decide for themselves, free from state interference, matters of church government as well as those of faith and doctrine."

344 U.S. at 116.

Petitioner insists (Pet. at 8) that "most decisions hold that courts may rule on discrimination claims against churches" (citations omitted). While literally true, the statement omits a crucial distinction: All such cases involve the rights of *non-ministerial* employees.

Petitioner next observes, with notable understatement, that the courts are "less likely to . . . rule on discrimination claims when the employee discriminated against is a member of the clergy." (*Id.* at 8-9). "Less likely" is hardly the phrase to describe the body of case law on this issue. In actuality, courts *never* hear such discrimination claims when the person claiming discrimination is a member of the clergy. Thus, while citing dozens of cases

involving job discrimination claims against religious organizations, Petitioner cannot point to a single case upholding such an action by a clergy person. To the contrary, *every* circuit and district court which has considered the question has decided the issue adversely to Petitioner's position and in a manner consistent with the Seventh Circuit's opinion below. See, e.g., *Natal v. Christian and Missionary Alliance*, 878 F.2d 1575 (1st Cir. 1989) (Clergyman could not recover against religious corporation for wrongful termination; notwithstanding claims that corporation violated its own rules or federal labor law); *DeMarco v. Holy Cross High School*, 4 F.3d 166, 171 (2nd Cir. 1993) (Right of non-clergy person to bring ADEA action upheld; however, court distinguished "pervasively religious relationship" which exists in clergy cases); *Rayburn v. Seventh Day Adventists*, 772 F.2d 1164 (4th Cir. 1985), *cert. denied*, 478 U.S. 1020 (1986) (Terminated pastor's suit against church for sex and race discrimination under Title VII dismissed in deference to the church's overriding right to freely choose its clergy); *McClure v. Salvation Army*, 460 F.2d 553 (5th Cir. 1972), *cert. denied*, 409 U.S. 896 (1972) (Sex discrimination claim by aggrieved clergy person; held: Congress in enacting Title VII did not intend to intervene between a church and its clergy); *Hutchinson v. Thomas*, 789 F.2d 392 (6th Cir. 1986), *cert. denied*, 479 U.S. 885 (1986) (Suit by involuntarily separated United Methodist minister; court held it could not constitutionally intervene in such a dispute); *Young v. Northern Illinois Conference of United Methodist Church et al.*, 21 F.3d 184 (7th Cir. 1994) (Case here under review; court declined to exercise subject matter jurisdiction in Title VII race/sex case brought by probationary minister against church officials); *Scharon v. St. Lukes Episcopal Presbyterian Hospitals*, 929 F.2d 360 (8th Cir. 1991) (Discharged priest precluded from proceeding with age and sex discrimination

actions against religious hospital due to risk of excessive entanglement and interference with free exercise); and *Minker v. Baltimore Annual Conference of United Methodist Church*, 894 F.2d 1354 (D.C. Cir. 1990) (Clergyman's ADEA case properly dismissed; remanded only for examination of limited contractual issue).

The touchstone of all the above cases and many others like them, is the notion that the right of churches to freely choose their own clergy is at the core of their ability to function and propagate their faith. The point was well made by the Fifth Circuit Court of Appeals in *Simpson v. Wells-Læmont Corporation et al.*, 494 F.2d 490 (5th Cir. 1974), where an expelled minister sought damages and other relief under 42 U.S.C. Section 1981. The court observed:

> "This case involves the fundamental question of who will preach from the pulpit of the church, and who will occupy the church parsonage. *The bare statement of the question should make obvious the lack of jurisdiction of a civil court. The answer to that question must come from the church.*
>
> * * *
>
> "The interaction between the church and its pastor is an integral part of church government."

(Emphasis added, 494 F.2d at 492-493)

B. Neither The So-Called "*Minker*" Exception Nor The Holding Of "*Employment Division v. Smith*" Requires Or Justifies A Contrary Result.

As noted at 1, *supra*, fn. 1, the only possible exception to the unbroken line of authority cited above is one narrowly crafted by the D.C. Circuit in *Minker*, *supra*, where the court stopped short of affirming a wholesale dismissal of a clergyman's wrongful termination suit. While uphold-

ing the dismissal of all ADEA causes of action, the court noted the existence of a well-pleaded claim based on breach of a verbal agreement. Based on the possibility that such a grievance might be resolved on "neutral" terms without undue entanglement with religion, the court guardedly approved a limited remand to explore that possibility. 894 F.2d at 1360. Obviously, *Minker* has no application to the instant case wherein no well-pleaded contractual cause of action can be discerned. Moreover, *Minker* is hardly in "conflict" with other circuits. Overall, it represents a strong affirmation of the rule that clergy termination suits based on alleged violations of federal discrimination laws cannot proceed.

Finally, Petitioner's suggestion that the Seventh Circuit disregarded this Court's teaching in *Employment Division v. Smith*, 494 U.S. 872, 108 L. Ed. 2d 876 (1990), simply is unsupportable. First, the vitality of *Smith* has been significantly undercut by the Religious Freedom Restoration Act of 1993. 42 U.S.C. Section 2000bb *et seq.* Second, it cannot be seriously contended that the *Smith* decision could ever warrant a departure from the long-standing rule precluding court scrutiny of pastor-church relations. In citing *Smith*, Petitioner has chosen a dubious fulcrum for launching her effort to bring about a momentous change in settled First Amendment law.

CONCLUSION

The ability of churches to choose their clergy without governmental surveillance or interference occupies a special place of protection in our constitutional jurisprudence. The courts below recognized that the First Amendment's religious guarantees occupy an even higher order of importance than the objective of redressing job discrimination. When the two conflicting goals collide, the religious protections contained within the Constitution must prevail. The Petition for Writ of Certiorari contains nothing which would warrant a re-examination of this doctrine by this Honorable Court. The Writ should be denied.

Respectfully submitted,

SAMUEL W. WITWER, JR.
Counsel of Record
JENNIFER K. POLTROCK
DANIEL G. MUSCA
WITWER, BURLAGE, POLTROCK
& GIAMPIETRO
125 South Wacker Drive
Suite 2700
Chicago, Illinois 60606
(312) 332-6000

Attorneys for Respondents

APPENDIX 1

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

No.
JURY TRIAL DEMANDED

DARREYL N. YOUNG,

Plaintiff,

-vs-

THE NORTHERN ILLINOIS CONFERENCE OF UNITED METHODIST CHURCH, THE BOARD OF ORDAINED MINISTRY AND R. SHELDON DUECKER, As The Presiding Bishop Of THE BOARD OF ORDAINED MINISTRY,

Defendants.

COMPLAINT

NOW COMES the Plaintiff, DARREYL N. YOUNG, by and through her attorneys, GOLDMAN AND MARCUS, and complains against the Defendants, THE NORTHERN ILLINOIS CONFERENCE OF UNITED METHODIST CHURCH, THE BOARD OF ORDAINED MINISTRY and R. SHELDON DUECKER, as the Presiding Bishop of THE BOARD OF ORDAINED MINISTRY, as follows:

1. This action is brought pursuant to Title VII for sex discrimination, race discrimination and retaliation in violation of 42 U.S.C., §2000e, et seq. Jurisdiction exists under 42 U.S.C., §2000e, et seq. and 28 U.S.C., §1331. Venue is present in the Northern District of Illinois.

2. Plaintiff has exhausted all remedies by filing a timely Complaint with the Equal Employment Opportunity Commission. A Final Decision was entered on July 30, 1992,

and Plaintiff received her right to sue letter on or about August 3, 1992.

3. The Plaintiff, DARREYL N. YOUNG, is a resident of Chicago, Cook County, Illinois. Plaintiff is of the female sex, and her race is Black.

4. The Defendants, THE NORTHERN ILLINOIS CONFERENCE OF UNITED METHODIST CHURCH, THE BOARD OF ORDAINED MINISTRY and R. SHELDON DUECKER, as the Presiding Bishop of THE BOARD OF ORDAINED MINISTRY, are residents of Chicago, Cook County, Illinois.

5. Plaintiff was a Probationary Ministerial Member of THE UNITED METHODIST CHURCH at all times relative to this Complaint. Plaintiff served as a Pastor for four (4) years, received excellent references from the church for which she was a Minister and received a favorable recommendation from her Supervising Elder for the position of "Elder" or "Clergy Member In Full Connection".

6. On or about March 24, 1992, the Plaintiff was denied an appointment to the position of "Elder" or "Clergy Member In Full Connection". The Defendants also voted to discontinue the Plaintiff as a Minister.

7. During Plaintiff's tenure as a Probationary Minister, she was a vocal advocate on protecting minority rights and had criticized the church in the past whenever minorities, and especially minority women, were being treated unfairly by other "Elders" or "Clergy Members In Full Connection".

COUNT I—SEX AND RACE DISCRIMINATION

1-7. Plaintiff realleges Paragraphs 1 through 7 above and as for Paragraphs 1 through 7 of this Count I.

8. The Plaintiff was treated differently than other similarly situated Probationary Ministers, who were seeking appointment as an "Elder" or "Clergy Member In Full Connection", but who were not Black females. Examples of this disparate treatment include, but are not limited to:

A. Probationary Members who are seeking an appointment as an "Elder" or a "Clergy Member In Full Connection" always have representatives of their same sex and race on the panel from THE BOARD OF ORDAINED MINISTRY, who reviews their application. There were no other Black female members on the panel from THE BOARD OF ORDAINED MINISTRY, which made the decision to discontinue the Plaintiff as a Probationary Minister.

B. The Defendants have not discontinued other Probationary Members on their first attempt to become an "Elder" or "Clergy Member In Full Connection". Defendants have always recommended at the very least, that the probation be continued for that applicant. Defendants, however, voted to discontinue the Plaintiff on her very first attempt to become an "Elder" or "Clergy Member In Full Connection".

C. The Defendants always follow the recommendation of a Supervising Elder when determining whether to promote a Probationary Minister to "Elder" or "Clergy Member In Full Connection". The Defendants, however, rejected the favorable recommendation of the Plaintiff's Supervising Elder, when they decided to deny her application and when they voted to discontinue her.

D. One (1) of the qualifications for becoming an "Elder" or a "Clergy Member In Full Connection" is that the applicant must have preached or given a sermon in the past. The Defendants criticized the Plaintiff's preaching skills, even though none of the members of the panel who interviewed her had ever heard her preach.

9. Plaintiff's application to become an "Elder" or "Clergy Member In Full Connection" was denied, and she was discontinued based on her race and sex, in violation of Title VII. The failure of Defendant to follow its own procedures in its review of Plaintiff's application to become an Elder tainted its decision process.

10. As a result of the Defendant's discriminatory conduct, the Plaintiff has been terminated from her position as a Probationary Minister, has been removed from her church and has been denied advancement within the Defendants' organization. Plaintiff has suffered a loss in pay and has suffered extreme emotional distress based on the Defendants' discriminatory actions.

WHEREFORE, Plaintiff requests this court enter a Judgment in favor of the Plaintiff and against the Defendants, and that the following relief be awarded:

A. That Defendants be ordered to reinstate the Plaintiff as a Probationary Ministerial Member and that Plaintiff be awarded back pay and be compensated for the loss of other employment benefits.

B. That Defendants be ordered to conduct a new review of the Plaintiff's application for "Elder" or "Clergy Member In Full Connection", and that Defendants be required to follow their usual and customary practices such as including other Black female Ministers or "Clergy Members In Full Connection" on the panel which reviews her application.

C. That Plaintiff be awarded compensatory damages in the amount of Fifty-Thousand Dollars ($50,000.00).

D. That the Plaintiff be awarded attorney's fees and costs.

E. That this court award such other relief as it deems appropriate.

COUNT II

1-7. Plaintiff realleges Paragraphs 1 through 7 above as and for its Paragraphs 1 through 7 of this Count II.

8. The Plaintiff was treated differently than other similarly situated Probationary Ministers, who were seeking appointment as an "Elder" or "Clergy Member In Full Connection", but who had not opposed the discriminatory practices of the Defendants. Examples of the disparate treatment include but are not limited to:

A. Probationary Members who are seeking an appointment as an "Elder" or a "Clergy Member In Full Connection" always have representatives of their same sex and race on the panel from THE BOARD OF ORDAINED MINISTRY, who reviews their application. There were no other Black female members on the panel from THE BOARD OF ORDAINED MINISTRY, which made the decision to discontinue the Plaintiff as a Probationary Minister.

B. The Defendants have not discontinued other Probationary Members on their first attempt to become an "Elder" or "Clergy Member In Full Connection". Defendants have always recommended at the very least, that the probation be continued for that applicant. Defendants, however, voted to discontinue the Plaintiff on her very first attempt to become an "Elder" or "Clergy Member In Full Connection".

C. The Defendants always follow the recommendation of a Supervising Elder when determining whether to promote a Probationary Minister to "Elder" or "Clergy Member In Full Connection". The Defendants, however, rejected the favorable recommendation of the Plaintiff's Supervising Elder, when they decided to deny her application and when they voted to discontinue her.

D. One (1) of the qualifications for becoming an "Elder" or a "Clergy Member In Full Connection" is that the applicant must have preached or given a sermon in the past. The Defendants, however, criticized the Plaintiff's preaching skills, even though none of the members of the panel who interviewed her had ever heard her preach.

9. Plaintiff's application to become an "Elder" or "Clergy Member In Full Connection" was denied, and she was discontinued because of her opposition to the Defendant's discriminatory practices. The Defendant intentionally deviated from its usual procedures of reviewing applications for appointment to an Elder. This deviation so tainted the Plaintiff's appointment process that it was impossible for her to have been appointed as an Elder. The Defendant deviated from its usual process in retaliation for Plaintiff having opposed discriminatory practices and advocating minority rights.

10. As a result of the Defendant's discriminatory conduct, the Plaintiff has been terminated from her position as a Probationary Minister, has been removed from her church and has been denied advancement within the Defendants' organization. Plaintiff has suffered a loss in pay and has suffered extreme emotional distress based on the Defendants' discriminatory actions.

WHEREFORE, Plaintiff requests this court enter a Judgment in favor of the Plaintiff and against the Defendants, and that the following relief be awarded:

A. That Defendants be ordered to reinstate the Plaintiff as a Probationary Ministerial Member and that she be awarded back pay and be compensated for the loss of other employment benefits.

B. That Defendants be ordered to conduct a new review of the Plaintiff's application for "Elder" or "Clergy

Member In Full Connection", and that Defendants be required to follow their usual and customary practices such as including other Black female Ministers or "Clergy Members In Full Connection" on the panel which reviews her application.

C. That Plaintiff be awarded compensatory damages in the amount of Fifty-Thousand Dollars ($50,000.00).

D. That Plaintiff be awarded Fifty-Thousand Dollars ($50,000.00) in punitive damages.

E. That the Plaintiff be awarded attorney's fees and costs.

F. That this court award such other relief as it deems appropriate.

GOLDMAN AND MARCUS

(3)

Supreme Court, U.S.
FILED
OCT 5 1994
OFFICE OF THE CLERK

No. 94-0282

In The

Supreme Court of the United States

October Term, 1994

DARREYL M. YOUNG,

Petitioner,

v.

THE NORTHERN ILLINOIS CONFERENCE OF UNITED METHODIST CHURCH, THE BOARD OF ORDAINED MINISTRY, and R. SHELDON DUECKER, as the Presiding Bishop of the BOARD OF ORDAINED MINISTRY,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

PETITIONER'S REPLY TO THE BRIEF IN OPPOSITION TO THE PETITION FOR CERTIORARI

P. JANE RUTHERFORD
Counsel of Record
DePaul Univ. College of Law
25 E. Jackson Blvd.
Chicago, IL 60604
(312) 362-5269

TIMOTHY P. O'NEILL
The John Marshall Law School
315 S. Plymouth Court
Chicago, IL 60604
(312) 987-2367

Attorneys for Petitioner

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

BEST AVAILABLE COPY

The Respondent discriminated against the Petitioner on the basis of sex and race. It also violated the terms of her employment contract. The Respondent does not contest either of these facts. Instead, the Respondent relies on its religious nature to shield it from accountability.

Similarly, the Respondent does not deny that *certiorari* is appropriate; instead it argues the merits of the case. For example, the Respondent does not challenge either the quantity or importance of the employment cases filed against religious institutions or that the Supreme Court is repeatedly troubled with petitions for certiorari in these cases. Nor does the Respondent dispute that the Seventh Circuit failed to follow binding Supreme Court precedent in *Employment Division v. Smith.* Finally, the Respondent admits that a conflict exists in the Circuits over whether courts can resolve contract disputes between clergy and their churches using neutral principles of contract law. Therefore, the reasons for granting *certiorari* go unchallenged.

Accordingly, this Reply addresses only the new points Respondent raises: (1) the existence of authority for clergy discrimination suits, (2) the Religious Freedom Restoration Act ("RFRA")[1] as a bar to this action, and (3) Respondent's quibbles with the pleading of the contract claim.

Although the Respondent admits that the majority of courts permit employment discrimination suits against religions, Respondent states that courts "*never* hear" clergy claims; that "all" cases that permit discrimination suits against churches "involve the rights of *non-ministerial* employees"; and that "*every* circuit and district court . . . has decided the issue adversely to Petitioner's position." (Resp. p. 5-6). Respondent goes so far as to say that "Petitioner cannot point to a single case upholding such an action by a clergy person." (Resp. p. 6).

---

[1] 42 U.S.C. § 2000bb *et seq.*

In fact, however, the first case cited in the Petition's Table of Authorities holds that a court may consider a pastor's discrimination claim. *Black v. Snyder*, 471 N.W.2d 715 (Minn.App. 1991) (Pet. p. iii; p. 5, n. 1).[2] In *Black*, a Lutheran associate pastor filed a sex discrimination suit alleging sexual harassment. In holding that a court could consider the pastor's discrimination claim, the court noted that it was merely applying a neutral law of general application, as required by *Employment Division v. Smith*, 494 U.S. 872 (1990). *Black v. Snyder*, 471 N.W.2d at 718.

Most of the cases cited by the Respondent to the contrary predate this Court's opinion in *Smith*. Neither of the two post-*Smith* cases Respondent cites[3] even mention *Smith*, let alone consider its impact on race discrimination claims against religious institutions. The Seventh Circuit failed to follow binding Supreme Court precedent when it refused to apply the neutral generally applicable provisions of Title VII to this claim of sex and race discrimination.

Respondent's sole response is to state that *Smith* has been undercut by RFRA. RFRA does not prohibit the government from enacting neutral laws of general applicability that intrude on religion; it merely requires a "compelling government interest" for doing so.[4]

This Court repeatedly has held that the government has a compelling state interest in eradicating racial discrimination. *See, e.g., Shaw v. Reno*, 113 S.Ct. 2816 (1993); *Crawford v. Board of Education*, 458 U.S. 527 (1982); *Fullilove v. Klutznick*, 448 U.S. 448, 496 (J. Powell concurring

---

[2] This state court's interpretation of the federal constitution is "entitled to consideration along with those of federal courts." *Caspari v. Bohlen*, 114 S.Ct. 948, 956 (1994).

[3] *DeMarco v. Holy Cross High School*, 4 F.3d 166 (2d Cir. 1993); and *Scharon v. St. Luke's Episcopal Presbyterian Hospitals*, 929 F.2d 360 (8th Cir. 1991).

[4] 42 U.S.C. § 2000bb *et seq.*

1980); *United States v. Paradise*, 480 U.S. 149 (1987); and *Metro Broadcasting, Inc. v. Federal Communications Commission*, 497 U.S. 547 (1990). The Court has upheld such a compelling state interest even when it intrudes on the first amendment rights of religious freedom. *Bob Jones Univ. v. United States*, 461 U.S. 574 (1983).

Indeed, Congressional power to dismantle race discrimination is conferred by the fourteenth amendment.[5] Consequently, it is not only a compelling state interest, but one provided for in the constitution itself. Therefore, the Court frequently has given deference to Congressional efforts to eliminate race discrimination. *Metro Broadcasting, Inc. v. Federal Communications Commission*, 497 U.S. 547 (1990); *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 490 (1989); *Fullilove v. Klutznick*, 448 U.S. 448 (1980).

Congress specifically decided to prohibit religious institutions from discriminating on the basis of sex or race when it carved out a narrow exception to Title VII for religious discrimination.[6] This conscious decision to apply Title VII to religious entities distinguishes Title VII claims from the age discrimination cases cited by Respondent[7] because it is less clear that Congress intended age discrimination laws to apply to churches. *DeMarco v. Holy Cross High School*, 4 F.3d 166, 169 (2d Cir. 1993). Because Congress intended religious entities to be bound by Title VII, it falls within the exception created by *NLRB v. Catholic Bishop*, 440 U.S. 490 (1979) that enables courts to consider neutral employment laws that are intended to apply to churches.

---

[5] U.S. Const. amend. XIV, § 5.

[6] 42 U.S.C. § 2000e-1(a).

[7] *DeMarco v. Holy Cross High School*, 4 F.3d 166 (2d Cir. 1993); *Minker v. Baltimore Annual Conference of United Methodist Church*, 894 F.2d 1354 (D.C. Cir. 1990).

The protection provided by RFRA is narrower than that provided by the first amendment. RFRA provides that "Government shall not substantially burden a *person's* exercise of religion. . . . "[8] In contrast, the first amendment prohibits laws "respecting an establishment of religion, or prohibiting the free exercise thereof. . . . "[9] Therefore, RFRA protects only individual rights of free exercise, while the first amendment might be construed to create rights in institutional religion.[10] This interpretation of the relevant language is consistent with this Court's construction of the word "person" in other contexts. For example, in construing the fourteenth amendment, this Court has held that the use of the word "person" confers individual, not class or group rights. *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 493 (1989). Similarly, the use of the word "person" in RFRA protects individuals, not institutions.

The individual who needs protection of her free exercise rights is the Petitioner. When courts exclude clergy from the protections provided by Congress, they place an undue burden on the free exercise right to pursue a career in the ministry. Refusal to apply these laws to clergy denies them equal protection of the law.

Respondent does not deny that a contract dispute exists or that such a dispute could be resolved with

---

[8] 42 U.S.C. § 2000bb (emphasis added).

[9] U.S. Const. amend. I.

[10] For arguments that the first amendment provides religious group rights *see* Douglas Laycock, *Towards a General Theory of the Religion Clauses: The Case of the Church Labor Relations and the Right to Church Autonomy*, 81 Colum. L. Rev. 1371 (1981); and Frederick Mark Gedicks, *Toward a Constitutional Jurisprudence of Religious Group Rights*, 1989 Wis. L. Rev. 99. *But see* Ira C. Lupu, *Free Exercise Exemption and Religious Institutions: The Case of Employment Discrimination*, 67 B.U. L. Rev. 391 (1987); and Ira C. Lupu, *Keeping the Faith: Religion, Equality and Speech in the U.S. Constitution*, 18 Conn. L. Rev. 739 (1986) (arguing that first amendment free exercise rights are individual rights).

neutral principles of contract law without intruding on religious freedom. Instead, the Respondent's sole response to the Petitioner's neutral contract claim is to assert that it was not sufficiently well pleaded. Respondent bickers about the wording of the complaint. Nevertheless, it is well settled that pleading is not a mere game of words: "The Federal Rules reject the approach that pleading is a game of skill in which one misstep by counsel may be decisive to the outcome and accept the principle that the purpose of pleading is to facilitate a proper decision on the merits." *Conley v. Gibson*, 355 U.S. 41, 48 (1957).

The complaint was not dismissed by the district court because it was not well pleaded, but because the court believed that the first amendment barred it from considering the case at all. That issue is appropriately before this Court because there is a conflict among the circuits over whether courts can use neutral contract principles to resolve contract disputes between clergy and religious institutions. *See, e.g., Minker v. Baltimore Annual Conference of United Methodist Church*, 894 F.2d 1354 (D.C. Cir. 1990) and *Natal v. Christian and Missionary Alliance*, 772 F.2d 1164 (4th Cir. 1985).

This Court should grant *certiorari* because this case raises important constitutional issues that recur frequently and have generated a split in the Circuits.

Respectfully submitted,

P. JANE RUTHERFORD
Counsel for Petitioner
25 E. Jackson Blvd.
Chicago, IL 60604
(312) 362-5269